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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 283

UNION TANK CAR COMPANY, a New Jersey corporation,

Petitioner,

vs.

DRAGOR SHIPPING CORPORATION, a Delaware corporation, formerly WARD INDUSTRIES CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNION TANK CAR COMPANY, a New Jersey corporation, petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above cause on April 7, 1966.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is not yet reported, but is printed as Appendix A hereto, *infra*, pp. 15-23. The United States District Court for the District of Arizona, sitting at Tucson, Arizona, rendered no opinion, but its decision necessarily included a finding that service of process had been duly made on Dragor's agent in Arizona (R. 12-14).

JURISDICTION

The judgment of the Court of Appeals was entered on April 7, 1966. It is printed as Appendix B hereto, *infra*, p. 24. On May 4, 1966, petitioner filed a timely petition for rehearing which was denied on May 24, 1966. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Where, after a foreign corporation has appointed a resident agent in Arizona to accept service of process, it executes a promissory note, and thereafter surrenders its license to do business in Arizona, is service on such agent pursuant to Rule 4(d)(3) of the Federal Rules of Civil Procedure, in an action in Arizona on such promissory note, violative of the due process clause of the Federal Constitution?

2. Where a foreign corporation has been served with process pursuant to an Arizona statute requiring an irrevocable consent, to service of process by service upon the Arizona Corporation Commission, upon a voluntary withdrawal from the state, and an action is

filed on a promissory note given by the corporation prior to withdrawal, in settlement of claims arising out of transactions in Arizona, is such service in such action violative of the due process clause of the Federal Constitution because, prior to such service, the foreign corporation had been permitted to surrender its license to do business in Arizona "except as to creditors"?

3. Where the State of Arizona has limited the surrender of a foreign corporation's license to transact business by permitting it to file a withdrawal from the state "except as to creditors," and it thereafter defaults under an agreement settling claims arising out of business activities in Arizona, does the due process clause preclude a court in Arizona from considering such prior business activity in determining whether jurisdiction over the foreign corporation in a suit on the settlement agreement can be obtained through substituted service of process made in accordance with the Arizona corporation laws?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions, statutes and rules involved are printed as Appendix C hereto, *infra*. pp. 25-27.

STATEMENT OF THE CASE

This action was filed against Dragor Shipping Corporation (Dragor) on December 23, 1964. The jurisdiction of the Arizona District Court was invoked on the basis of diversity of citizenship. Union Tank Car Company (Union) is a New Jersey corporation having its principal place of business in Illinois. Dragor is a

Delaware corporation having its principal place of business in New York (R.2).

The complaint alleged that Dragor had defaulted in payment of the sum of $1,000,000 and interest under a promissory note and an agreement settling claims between the parties which arose out of construction contract work performed in the State of Arizona (R.2-4). Service of process was made upon Dragor by delivering copies of the summons and complaint to both Dragor's registered agent, C.T. Corporation, and the Arizona Corporation Commission (R.12-14).[1]

On January 12, 1965 Dragor appeared specially and filed a motion to quash service of process and dismiss the action on the ground that the District Court had not obtained jurisdiction over its person through the service of the process employed (R.15-16). The motion was submitted on pleadings, affidavits, and exhibits which established the following facts accepted by both parties and the courts below as true (R.2-11, 17-27, 61-63).

On July 29, 1947 Dragor had obtained a certificate of authority from the Arizona Corporation Commission to transact business within Arizona. It continually maintained that authority until April 30, 1964 (R.25). Dragor designated C. T. Corporation as its statutory agent upon whom process might be served in Arizona (R.14). Under A.R.S. § 10-481 the Arizona

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[1] Service was made on both the designated agent and the Arizona Corporation Commission, pursuant to *Arizona Barite Co.* v. *Western-Knapp Engineering Co.* (C.A.9,1948), 170 F.2d 684. In that case, after the defendant corporation had withdrawn from Arizona and sought to revoke the appointment of its agent, service had been made, both on the designated agent and the Arizona Corporation Commission, and such service was held valid.

Corporation Commission was irrevocably designated as agent for Dragor, in the event of revocation or withdrawal of its certificate, for the purpose of receiving process in actions involving business done or transactions arising in Arizona (Appendix C, *infra,* p. 26).

While so licensed to transact business in Arizona, Dragor formed a joint venture with Idaho-Maryland Industries, Inc. (IMI), a California construction company. On October 23, 1961 that joint venture entered into a second tier subcontract with Union for the construction of Titan II missile base facilities in California and Arizona. The Arizona construction involved work on the facilities at Davis-Monthan Air Force Base, Tucson, Arizona. During the performance of this work, IMI filed a petition under Chapter XI of the Bankruptcy Act in the United States District Court for the Southern District of California (R.5).

In May, 1962 Union asserted that the joint venture was in default in the performance of the Arizona work and filed a diversity action against Dragor in the United States District Court for the Northern District of Illinois, Eastern Division, in order to recover its losses. Dragor appeared and moved to transfer the action to the United States District Court for the District of Arizona on the ground that all matters involved in the action originated in Arizona. After the case was so transferred, Dragor instituted a separate action against Union in the same Arizona District Court, seeking rescission of the construction contract and damages (R.5-8).

On October 3, 1963, shortly before the date set for trial *and while Dragor was still licensed to transact business in Arizona,* the parties entered into a settle-

ment agreement pursuant to which Dragor agreed to pay Union $1,000,000 with interest on or before September 30, 1964 (R.5). The agreement further provided for the exchange of releases by the parties of their respective claims in the above-described litigation and for the dismissal with prejudice of their respective actions then pending in the Arizona District Court. The documents contain no provisions specifying them to be New York contracts; it is not claimed the parties intended them to be New York contracts; and the note evidencing the $1,000,000 indebtedness specifically provides that it is to be construed according to the law of Illinois, where Union's principal office is located. The documents were signed in New York October 3, 1963 by Dragor's officers. On the same day, in Arizona, the contract was partially performed when local counsel for the parties prepared, executed and filed in the District Court in Tucson, Arizona, stipulations for dismissal of the cases pending in Arizona (R.6); whereupon the court entered an order of dismissal.

On April 30, 1964, seven months after executing the $1,000,000 note and settlement agreement, Dragor obtained permission from the Arizona Corporation Commission to withdraw from the state. A certificate was issued by the Commission stating (R.25):

> "I, S. C. CORBITT, Secretary of the Arizona Corporation Commission, do hereby certify that the records of the Arizona Corporation Commission show WARD INDUSTRIES CORPORATION, a DELAWARE corporation qualified on the 29th day of July, 1947, and existing under and by virtue of the laws of the State of Arizona, deposited in the office of the Arizona Corporation Commission a WITHDRAWAL, and did on April

30, 1964, complete all requirements necessary to permit the filing of said Withdrawal and thereupon said corporation ceased to exist, except as to creditors."

Based on the foregoing facts, the District Court on February 2, 1965, denied the motion to quash and dismiss Union's case and directed Dragor to answer the complaint (R.182). In its answer, Dragor did not dispute non-payment of the $1,000,000 indebtedness, but did assert a counterclaim for damages in an amount of "not less than the sum of $1,000,000" on the ground that Union had breached the settlement agreement by improperly prosecuting certain claims against the United States Government "arising from and out of the Titan II Davis-Monthan Air Force Base Contract" in Arizona, in which claims Dragor asserted that it retained a contingent financial interest (R.98).

On June 1, 1965, the District Court entered judgment against Dragor for $1,037,500 pursuant to F.R.C.P. Rule 54(b) (R.151, 184). The District Court then set Dragor's counterclaim for trial on December 7, 1965.[1]

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[1] When the case was called on the trial date, Dragor's counsel did not appear to prosecute the counterclaim and it was dismissed for want of prosecution. An appeal from that dismissal is presently pending before the Court of Appeals for the Ninth Circuit (Docket No. 20904).

On appeal, the court below reversed the judgment of the District Court on the ground that the service of process employed in the action was insufficient to secure jurisdiction over Dragor's person because that corporation had not had "minimum contacts" with Arizona sufficient to satisfy the due process requirements of the Federal Constitution. The Court was of the opinion that where

> "the agreement sued upon is in the nature of a settlement of existing claims, and the only issues presented relate to its breach and not its validity, we think the antecedent dealings are without constitutional significance and do not provide the necessary substantial connection." (Appendix A, p. 22)

The court concluded that Union must bring its action against Dragor in New York, where the documents were signed, or in Delaware, where Dragor was incorporated, rather than Arizona, where the contract which gives rise to the controversy was to be performed. (Appendix A, p. 23)

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is In Conflict With Decisions Of This Court In That It Holds That A Service Of Process Made Under Rule 4(d)(3) Of The Federal Rules Of Civil Procedure Is Unconstitutional. The Court Below Said: "It is sufficient to say that the service of process thereby authorized must pertain to an action arising out of or involving business done or transactions arising in Arizona."

In *Ex parte Schollenberger,* 96 U.S. 369 (1878), this Court held that the designation of an agent by a foreign corporation pursuant to state law constituted an actual consent by that corporation to be found within the state and to be subject to the jurisdiction of local courts through service of process on the statutory agent. Suits in the Federal courts situated in the state were also held within the scope of that consent. *Oklahoma Packing Co.* v. *Oklahoma G. & E. Co.,* 309 U.S. 4, 7 (1939).

Moreover, the fact that the foreign corporation at a later date might voluntarily surrender its certificate of authority and discontinue transacting business in a particular state is held not to terminate the authority of the designated agent to accept service of process. This was decided in *Mutual Res. Fund Checking Asso.* v. *Phelps,* 190 U.S. 147 (1902), and was reaffirmed in *Washington ex rel Bond & G. & T.* v. *Superior Court,* 289 U.S. 361 (1932) where this Court declared, "the provision that the liability thus to be served should continue after withdrawal from the state afforded a lawful and constitutional protection of persons who had there transacted business with the appellant." (289 U.S., at p. 364.) See also *American R. Exp. Co.* v. *Royster Guano Co.,* 273 U.S. 274 (1927). Compare

Arizona Barite v. *Western Knapp Eng., Co.,* (C.A.9, 1948, 170 F.2d 684), holding the method of service used in the instant case to be valid, under Arizona law, on a withdrawn foreign corporation.

The *Schollenberger* doctrine was further expanded in *Nierbo Co.* v. *Bethlehem Shipping Corp.,* 308 U.S. 165 (1939), where the designation of the statutory agent was held to constitute a waiver of venue as well as a method for securing personal jurisdiction over a foreign corporation. In describing the scope and meaning of such designation, attention was called to Justice Cardozo's statement that "the stipulation is . . . a true contract. The person designated is a true agent. The consent that he shall represent the corporation is a real consent." *Bagdon* v. *Philadelphia R. Coal & I. Co.,* 217 N.Y. 432, 436, 111 N.E. 1075 (1916).

Pursuant to Ariz. Rev. Stat. § 10-481, Dragor appointed C. T. Corporation as its statutory agent in Arizona. C. T. Corporation accepted service on behalf of Dragor in this action (R.15), and the latter has never contended that this agent thereby acted contrary to prior instructions or that it had ever received any notification from Dragor that such agency was revoked. Service on this "true" agent, therefore, complied exactly with F.R.C.P. Rule 4(d)(3), which provides that in any civil action instituted in a United States district court, personal jurisdiction over a foreign corporate defendant may be secured by delivering a copy of the summons and complaint in the action to an "agent authorized by appointment or by law" to receive process.

The court below does not find or rule that the principal-agent relationship between Dragor and C. T. Cor-

poration had been severed by any notice to the agent when Dragor received limited permission to withdraw from Arizona, nor does the court find any revocation of the agency by operation of law, nor is any revocation asserted by Dragor.

The petitioner submits that the court below has held that service of process on Dragor's appointed agent in Arizona is unconstitutional under the due process clause of the Federal Constitution in direct conflict with the *Schollenberger* line of cases as well as the minimum contacts doctrine announced in *International Shoe Co.* v. *State of Washington,* 326 U.S. 310 (1945), and applied in *McGee* v. *International Life Ins. Co.,* 355 U.S. 220 (1957).

2. The Refusal To Permit Service Of Process Pursuant To The Arizona Statute In Effect Holds Such Statute Unconstitutional In Conflict With The Decisions Of This Court.

This Court has recognized the important public interest involved in providing citizens with a local forum in which they may resolve controversies with persons residing outside state borders. In consequence, state statutes liberalizing the use of the substituted service of process or so-called "long-arm" statutes have been approved so long as the controversy in suit arises out of some activity undertaken by the non-resident within the forum state. *McGee* v. *International Life Ins. Co.,* 355 U.S. 220 (1957).

The Court of Appeals declared, "The claims here asserted by Union do not arise out of or involve business done or transactions arising in [Arizona]. They pertain only to the settlement agreement executed and delivered in New York." (Appendix A, *infra,* p. 23.)

The Court also said, "No contention raised in Union's complaint or Dragor's answer brings into question any issue of fact or law pertaining to the former dealings between these parties in Arizona." (Appendix A, *infra*, p. 21.)

These statements overlook the important facts that the settlement agreement concerned an existing controversy over the performance of substantial construction work in Arizona, and that Dragor has a pending counterclaim for over $1,000,000 damages for alleged breach of such agreement. (R.98) The Court believed that requirements of due process prevented any consideration of Dragor's business activities in Arizona leading up to the settlement because at common law the agreement worked an accord and satisfaction which "superseded and extinguished" all previous existing claims. (Appendix A, *infra*, p. 21.)

The Court on due process grounds now makes the availability of a local forum depend upon whether the citizen has sought to settle his claim. When settlement is eschewed, jurisdiction over a non-resident is assured. When settlement is agreed upon, even though the settlement is subsequently repudiated as both parties claim in the instant case, jurisdiction over a defaulting corporation is no longer available regardless of how substantial its contacts with the forum, at least where the agreement happens to be executed outside the state.

In effect, the Court held here that the settlement contract insulated Dragor from its contacts with Arizona over a period of 17 years. Despite the fact that it was indebted on the settlement contract and note at the time it withdrew, under the lower court's theory,

the settlement contract operates retroactively to a date prior to Dragor's withdrawal from Arizona.

This strained and technical view was apparently promulgated on the mistaken theory that otherwise Rule 4(d)(3), under this state of facts, would be unconstitutional as violative of due process of law.

The instant decision thus, in effect, overrules prior decisions of this Court. It should be rejected on review by this Court.

CONCLUSION

For the reasons stated above, petitioner prays that a writ of certiorari issue to review the judgment of the court below.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUT

DRAGOR SHIPPING CORPORATION, a corporation, formerly Ward Industries Corporation,

Appellant,

vs.

UNION TANK CAR COMPANY, a corporation,

Appellee.

No. 20,416

[April 7, 1966]

Appeal from the United States District Court
for the District of Arizona

Before: HAMLEY, MERRILL and BROWNING, Circuit Judges

HAMLEY, Circuit Judge:

Union Tank Car Company (Union) brought this action against Dragor Shipping Corporation, formerly Ward Industries Corporation, in the United States District Court for the District of Arizona.[1] Plaintiff sought a judgment in the sum of $1,000,000, with interest from January 1, 1964. Such relief was claimed on the basis of an allegation that Dragor had failed to fulfill its obligations, under a settlement agreement dated October 3, 1963, to pay that amount, and under a promisory note in that amount given to Union by Dragor under the terms of the agreement.

District court jurisdiction was asserted on the basis of diversity of citizenship. Union is a New Jersey corporation having its principal place of business in Illinois. Dragor is a Delaware corporation having its principal place of business in New York.

[1]For convenience, both Dragor and its predecessor, Ward Industries Corporation, will be herein referred to as Dragor.

Service was made upon Dragor by delivering copies of the summons and complaint to the Director of Incorporation of the Corporation Commission of the State of Arizona, and to the assistant secretary of Dragor's purported statutory agent, C. T. Corporation. Dragor appeared specially and moved for an order quashing, vacating and annulling the service of process as invalid, and dismissing the summons and complaint, on the ground that the court did not obtain jurisdiction over the person of Dragor or the subject matter of the action.

The motion to quash and dismiss was denied. The district court thereafter denied Dragor's motion to amend the order to add recitals thereto which would have permitted an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1964). Dragor then moved in this court for leave to file a petition for a writ of prohibition restraining the district court from proceeding with the action in that court. We denied leave to file the petition.

Dragor then filed its answer in which it denied the essential allegations of the complaint, and raised the defenses of lack of jurisdiction, insufficiency of process and improper venue. As a part of its answer, Dragor asserted a counterclaim in which it was alleged that Union had breached the settlement agreement and a separately executed covenant not to sue. Dragor sought dismissal of the complaint and judgment against Union in the sum of not less than $1,000,000.[2]

Union, proceeding under Rule 12(c), Federal Rules of Civil Procedure, responded with a motion for judgment in its favor on the complaint on the ground that Dragor's answer failed to state a legal defense.[3] At the same time, Union moved for dismissal of the counterclaim pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure (failure to state a claim upon which relief can be

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[2]In its counterclaim Dragor stated that, to avoid a default in answering, it had been compelled to file the counterclaim as a compulsory counterclaim, and that it did so without waiving or intending to waive the objections which it had theretofore raised and asserted, and had alleged in its answer, ". . . to the jurisdiction and venue of this court."

[3]In the consideration of that motion, matters outside the pleadings, consisting of affidavits and exhibits, were presented to and not excluded by the district court. Under Rule 12(c), the motion must therefore be treated as one for summary judgment under Rule 56, Federal Rules of Civil Procedure.

granted). The motion for judgment on the complaint was granted and the motion to dismiss the cross complaint was denied.[4] Pursuant to Rule 54(b), Federal Rules of Civil Procedure, the court made an express determination that there was no just reason for delay and directed the entry of judgment on the complaint in the sum of $1,037,500. A judgment in this sum was entered on June 1, 1965. Dragor then took this appeal from the judgment and also from the earlier order denying its motion to quash, vacate and annul the service of process.

Dragor's sole contention on the appeal is that the Arizona District Court's assumption of jurisdiction over the person of Dragor and thereby over the subject matter of this action deprived Dragor of due process, and is therefore unconstitutional.[5]

The principle Dragor seeks to invoke is that due process requires that in order to subject a defendant to a judgment *in personam*, if he is not present within the territory of the forum, he must have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. See *International Shoe Co. v. Washington*, 326 U.S. 310, 316.[6]

The established facts necessary to be considered in determining whether Dragor had the minimum contacts with Arizona sufficient to satisfy this due process requirement, are set out below.

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[4]Union advises in its brief on appeal that trial on the counterclaim was set for December 7, 1965. At that time Dragor failed to appear and its counterclaim was dismissed for lack of prosecution. Dragor's appeal from that order is now pending in this court in Docket No. M-2709.

[5]Thus Dragor does not renew here the defense, raised in its answer, that, under 28 U.S.C. § 1391(c) the district court of Arizona constituted an improper venue.

[6]The same principle, in effect, was applied in the subsequent Supreme Court cases of *McGee v. International Life Ins. Co.*, 355 U.S. 220, and *Hanson v. Denckla*, 357 U.S. 235. In the later decision of this court in *L. D. Reeder Contractors of Arizona v. Higgins Industries, Inc.*, 9 Cir., 265 F.2d 768, 771, this court after saying that the problem was one of "judicial jurisdiction," approved the following statement:

> ". . . judicial jurisdiction exists whenever a state has sufficient contact with a person to make the exercise of jurisdiction reasonable, *i.e.*, to make it consistent with the requirements of due process for the state to try in its courts a particular case relating to that person."

On July 29, 1947, Dragor obtained a certificate of authority from the Arizona Corporation Commission authorizing that company to transact business within Arizona. This was done in conformity with the requirements of Ariz. R.S. § 10-481. In obtaining that authority Dragor, among other things, complied with the requirement of section 10-481(A)(2) which provides that a foreign corporation must:

> " . . . file with the corporation commission, in the form prescribed by the commission, an irrevocable consent to service of pleadings or process which shall become effective upon the revocation, annulment or voluntary withdrawal of the license to do business in this state, and which shall provide that actions arising out of or involving business done or transactions arising in this state may be commenced against the corporation in any court of competent jurisdiction within this state, by the service of pleadings or process upon the commission."

While licensed to transact business in Arizona, Dragor formed a joint venture with Idaho-Maryland Industries, Inc., (IMI), a California construction company. On October 23, 1961, that joint venture entered into a second-tier subcontract with Union for the construction of facilities in California and Arizona. The Arizona construction consisted of Titan II missile launch facilities at the Davis-Monthan Air Force Base, Tucson, Arizona. During the performance of this work, IMI filed a petition under Chapter 11 of the Bankruptcy Act in the United States District Court for the Southern District of California. Certain proceedings between Dragor and IMI ensued, resulting in a compromise agreement between them under which Dragor took an assignment of all of IMI's rights under the contract between the joint venture and Union.

In May, 1962, asserting that the joint venture was unable to complete the Arizona work, Union filed a diversity action against Dragor in the United States District Court for the Northern District of Illinois, to recover losses alleged to have been sustained by reason of the asserted default. Dragor entered a general appearance in the action and moved to transfer it to the United States District Court for the District of Arizona on the ground that all matters involved in the action originated in Arizona. The case was thereupon transferred to the United States District Court for the District of

Arizona, at Tucson, where it was docketed as *Union Tank Car Company v. Ward Industries Corporation,* Civ. 1482—Tuc. While this case was being transferred to Arizona, Dragor instituted a separate action against Union in the same Arizona court, seeking rescission of the subcontract with Union and money damages. This case was docketed as *Ward Industries Corporation v. Union Tank Car Company,* Civ. 1478—Tuc.[7]

Extensive pretrial proceedings were subsequently conducted. However, on October 3, 1963, just prior to the trial date of these actions, the parties entered into an agreement of settlement. Under the terms of this agreement Union and Dragor mutually released each other from any and all actions and claims, with certain exceptions.[8] It was provided that stipulations of dismissal with prejudice would be delivered by the parties in the two Arizona actions referred to above.

With regard to the *Mosher Steel Company* action referred to in note 8, or any other action which might result from a claim asserted by Mosher Steel Company against Union or Dragor, Union and Dragor separately covenanted not to assert any claim against the other. This covenant not to sue was executed at the same time as the settlement agreement.

Under the settlement [illegible] Dragor agreed to pay Union, on or before September [illegible] um of $1,000,000, with interest at the rate of five [illegible] commencing from January

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[7]As another outgrowth of the controversy which developed between these companies, Union made certain claims over against Ward in *United California Bank v. Union Tank Car Company,* Case No. 62-1023 JWC in the United States District Court for the Southern District of California.

[8]These exceptions were as follows:

"2. This agreement shall not constitute a release by UNION or WARD of any claim which either party may have against the other arising out of an action entitled MOSHER STEEL COMPANY, ET AL, VS. THE FLUOR CORPORATION, LTD., ET AL, in the U.S. District Court, Tucson District, Case No. CIV 1605,

"3. This agreement shall not constitute a release by WARD of the claim of IMI-WARD, a Joint Venture, for contract adjustments dated August 23, 1963 which claim shall be filed by UNION with THE FLUOR CORPORATION, LTD., and the U.S. Government with such changes therein as UNION shall make with intent to improve said claim."

1, 1964, such sum to be evidenced by a non-negotiable promissory note of Dragor drawn to the order of Union. The settlement agreement further provided that Dragor would assign to William B. Browder all claims of the joint venture against Union, The Fluor Corporation, Ltd., or the United States arising out of construction of facilities at the Davis-Monthan Air Force Base, Tucson, under the contract referred to above. It was provided that sums actually received by Union from the Fluor Corporation, Ltd., the United States or otherwise, after September 30, 1963, as a result of that contract, would be used to reduce the sum and obligation set forth in the note, according to a prescribed schedule.[9]

The settlement agreement, promissory note and covenant not to sue were executed and delivered between Union and Dragor in New York. The stipulations dismissing the two Arizona suits, called for by the settlement agreement, were executed in New York and thereafter filed in Arizona. Several months after this had been done, on April 30, 1964, Dragor deposited in the office of the Arizona Corporation Commission a "withdrawal" from Arizona. The Commission's certificate to this effect states that Dragor had completed all requirements necessary to permit the filing of the withdrawal ". . . and thereupon said corporation ceased to exist, except as to creditors."

Dragor did not pay to Union on the appointed day of September 30, 1964, the $1,000,000 called for by the settlement agreement and promissory note. Accordingly, on December 1, 1964, towards the close of the trial in the *Mosher Steel Company* action in the Arizona District Court in which both Union and Dragor were defendants, Union moved for leave to file a cross-claim against Dragor to recover judgment in the sum of $1,000,000 for breach

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[9]The settlement agreement contains this further provision concerning Dragor's stipulated payment to Union:

> "In the event that the aforementioned claims have not been finally determined and paid to UNION prior to September 30, 1964, WARD shall pay the principal sum and interest as hereinbefore set forth less credits for payments made by THE FLUOR CORPORATION, LTD., or the U.S. Government to UNION prior to September 30, 1964, and UNION shall thereafter promptly pay over to WARD any sums due and payable under this paragraph No. 5 which THE FLUOR CORPORATION, LTD., or the U.S. Government shall pay to UNION thereafter."

of the settlement agreement and failure to pay the promissory note. On December 21, 1964, the court in that case denied the motion.

Two days later Union commenced the action now before us, making the same claims that it had sought to assert as a cross-claim in the *Mosher* case. As before stated, copies of the summons and complaint were served upon the Arizona Commission and Dragor's purported statutory agent.[10] Dragor responded with its motion to quash and dismiss in which that company advanced the constitutional argument which it renewed in its answer and reasserts on this appeal.

Union's claims against Dragor, asserted in this suit, are based upon the alleged breach of the settlement contract and nonpayment of the promissory note. If that contract and promissory note have a "substantial connection" with Arizona, the requirements of due process have been satisfied. See *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223.

Union argues, in effect, that this contract and note have substantial connection with Arizona because, although executed and delivered in New York, they were intended to compose differences between the parties arising from their business dealings with each other in Arizona.

All business dealings in Arizona between Union and Dragor had ceased before the settlement agreement was executed. There remained certain legal claims, one against the other, arising from those dealings. Those legal claims were, with the exceptions referred to in note 8, completely superseded and extinguished by the settlement agreement and promissory note.[11] No contention raised in Union's complaint or Dragor's answer brings into question any issue of fact or law pertaining to the former dealings between these parties in Arizona. The claims sued upon neither arise from nor involve the prior dealings, but are concerned only with whether there has been a breach of the subsequently-executed settlement agreement and note.

In *McGee, supra,* no activity apart from or antecedent to the

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[10]It is not contended that the summons and complaint did not reach Dragor or, that Dragor did not have actual notice of the pendency of this suit.

[11]See *Pacheco v. Delgardo*, 46 Ariz. 401, 52, P.2d 479, 480; *Cano v. Arizona Frozen Products Co.*, 38 Ariz. 404, 300 Pac. 953; *Wilson v. Bogert*, 81 Ida. 535, 347 P.2d 341, 345.

contract was relied upon by the court in holding that the contract sued upon was sufficiently connected with the forum state to satisfy the due process requirements. It would not be correct, however, to say that such activity will never be relevant in establishing the necessary minimum contact. A contract upon which suit is brought may bring into issue prior dealings between the parties in the forum state, and these dealings may well provide a basis for jurisdiction. But where the agreement sued upon is in the nature of a settlement of existing claims, and the only issues presented relate to its breach and not its validity, we think the antecedent dealings are without constitutional significance and do not provide the necessary substantial connection.

Union further contends that under the settlement agreement the obligation upon which this suit was brought did not become effective until the two Arizona suits (Civ. 1482—Tuc .and Civ. 1478—Tuc.) were dismissed, and that, under the agreement, the dismissal of those suits was a condition to the delivery of the promissory note.

Nothing contained in the settlement agreement supports either of these assertions. Under that agreement Dragor was obliged to join in the dismissal of the Arizona suits. It did so. If it had not done so it would have been liable under the contract which was in effect when executed and delivered. The note was executed and delivered simultaneously with the settlement agreement in performance of one of the terms of the agreement. Had Dragor failed to execute and deliver the note it would have breached the settlement agreement.

The execution and delivery of the note took place in New York and so could not, in any event, have significance where the inquiry concerns activity in the forum state. The stipulations dismissing the Arizona suits were executed in New York but filed in Arizona. Such filing was long prior to September 30, 1964, when, Union asserts,

---

[12]Nor does such act constitute the doing of business in Arizona. This is true because: (1) the only doing of business which is significant is that which is taking place when the cause of action arose or when the suit was begun, and here the filing was long prior thereto; and (2) participation in litigation in the courts of a state does not constitute the doing of business within that state. *Martin v. Bankers' Trust Co.*, 18 Ariz. 55, 156 Pac. 87, 90; *Compagnie DuPort De Rio De Janiero v. Mead Morrison Mfg. Co.*, D.C.D.M., 19 F.2d 163, 169; *Edward Sales Co. v. Harris Structural Steel Co.*, D.C.D.M., 17 F.2d 155, 157.

Dragor committed the breaches sued upon. The filing of these dismissals constitutes an isolated inconsequential act having no legal significance in this law suit. It does not provide a substantial connection of the kind referred to in *McGee*.[12]

Union argues that jurisdiction over Dragor was secured pursuant to Rule 4(d)(3) of the Federal Rules of Civil Procedure and Ariz. R.S. § 10-481. It is sufficient to say that the service of process thereby authorized must pertain to an action arising out of or involving business done or transactions arising in Arizona. Ariz. R.S. § 10-481(2); *Arizona Barite Co. v. Western-Knapp Engineering Co.*, 9 Cir., 170 F.2d 684-687. The claims here asserted by Union do not arise out of or involve business done or transactions arising in that state. They pertain only to the settlement agreement and note executed and delivered in New York.

Union points out that the certificate of the Arizona Commission provides that Dragor is no longer present in Arizona "except as to creditors," and argues that Union qualifies as a creditor. In our opinion, however, the quoted words are intended only to preserve such right as a creditor may assert under Arizona R.S. § 10-481(2). That, as we have seen, is the right to subject Dragor to personal jurisdiction in the courts of Arizona by service of pleadings or process upon the Commission, but only with regard to actions arising out of or involving business done or transactions arising in Arizona.

The result which we reach here places no hardship upon Union, but protects Dragor from the hardship of being hauled across the country to defend itself in a suit exclusively predicated upon claims arising in New York. Union is a New Jersey corporation and has its principal place of business in Illinois. Nothing in this record suggests how it will be prejudiced by suing Dragor in Delaware, where it was incorporated, or New York, where it has its principal place of business and where this cause of action arose. Arizona has no interest in providing Union with a forum for such an action.

Reversed.

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DRAGOR SHIPPING CORPORATION, a corp., formerly Ward Industries Corp.,
Appellant,

vs.

No. 20,416

UNION TANK CAR COMPANY, a corp.,
Appellee.

APPEAL from the United States District Court for the.....District of Arizona.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the.....District of Arizona, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the.....judgment of the said District Court in this Cause be, and hereby is reversed, with costs in this Court in favor of the appellant and against the appellee.

COSTS:

Supersedeas Bond	$5,713.00
DC Appeal Fee	5.00
Appeal Bond premium	10.00
Ninth Cir. Docket Fee	25.00
Reproduction costs:	56.11
Total	$5,809.11

Filed and entered April 7, 1966.

RECEIVED June 16, 1966.

APPENDIX C

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

1. Constitution of the United States.

Amendment V, providing in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

Amendment XIV, providing in pertinent part:

> "Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Federal Rules of Civil Procedure, Rule 4(d), providing in pertinent part:

> "The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:
>
> * * *
>
> "(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.
>
> * * *
>
> "(7) Upon a defendant of any class referred

to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state."

3. Ariz. Rev. Stat. § 10-481, providing in pertinent part:

"Requirements for Doing Business; Exceptions. —*A.* A foreign corporation before entering upon, doing or transacting any business, conducting any enterprise, or engaging in any occupation in this state shall:

* * *

"2. File with the corporation commission a certificate, in the form prescribed by the commission, designating the address of the statutory office of the corporation in this state which may be, but need not be, the same as its place of business in this state, and appointing a statutory agent upon whom notices and processes, including service of sumons, may be served, which agent may be a natural person, a bona fide resident of this state for at least three years, or a domestic corporation or foreign corporation licensed to transact business in this state, empowered by the articles of incorporation to act as such agent, whose business address, if a corporation, shall be identical with such statutory office, and file with the corporation commission, in the form prescribed by the commission, an irrevocable consent to service of pleadings or process which shall become effective upon the revocation, annulment or voluntary withdrawal of the license of the corporation to do business in this state, and which shall provide that actions arising out of or involving business done or trans-

actions arising in this state may be commenced against the corporation in any court of competent jurisdiction within this state, by the service of pleadings or process upon the commission. The commission, upon being served, shall forward by registered mail a duplicate copy of the pleading or process, or both, to the last address of the corporation on file with the commission against which the pleading or process is directed."

Ariz. Rev. Stat. § 10-484, providing in pertinent part:

"C. Every foreign corporation licensed to do business in this state may surrender its license by filing with the corporation commission, in the form prescribed by it, a notice of withdrawal, or by filing a certified copy of a resolution of dissolution as prescribed by the laws of the state in which the corporation is domiciled, a notice from the state tax commission as provided in § 10-367, and by payment of any applicable fee authorized by statute."

Ariz. Rev. Stat. § 10-484.01, providing in pertinent part:

"Effect of Statutory Agents; Revocation of Existing Agents.—A. All appointments of statutory agents by a foreign corporation made prior to and which are in effect on June 30, 1958, shall continue in full force and effect until revoked as provided in subsection B.

"B. If the corporation has appointed more than one statutory agent in this state, it may file with the corporation commission a certificate, in the form prescribed by the commission, designating one of such statutory agents as its statutory agent pursuant to section 10-481 and revoking the appointment of all other statutory agents."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 283

UNION TANK CAR COMPANY, a New Jersey corporation,
Petitioner,

v.

DRAGOR SHIPPING CORPORATION, a Delaware corporation, formerly WARD INDUSTRIES CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT DRAGOR SHIPPING CORPORATION IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 283

UNION TANK CAR COMPANY, a New Jersey corporation,
Petitioner,

v.

DRAGOR SHIPPING CORPORATION, a Delaware corporation, formerly WARD INDUSTRIES CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT DRAGOR SHIPPING CORPORATION IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The respondent, Dragor Shipping Corporation ("Dragor"), formerly Ward Industries Corporation, respectfully prays, for the reasons and upon the authorities hereinafter set forth, that this Petition for a Writ of Certiorari be denied.

The Judgment of the Court of Appeals Sought To Be Reviewed

The petitioner, Union Tank Car Company ("Union"), is a New Jersey corporation, with its principal place of business in the State of Illinois. The respondent Dragor is a Delaware corporation, with its principal place of business in the State of New York. Union sought to institute the within action against Dragor in the United States District Court of Arizona upon causes of action arising in the State of New York based upon Dragor's alleged default under an agreement of settlement and non-negotiable promissory note, both of which were executed, delivered and allegedly breached in the State of New York.

At the time that Union's causes of action allegedly arose in the State of New York, and for many months, indeed years, prior thereto, Dragor was not engaged in the transaction of any business in the State of Arizona. Nor was it qualified to do business therein. It had formally withdrawn from the State of Arizona under a certificate duly issued by the Arizona Corporation Commission approximately five months before the causes of action allegedly arose and approximately eight months before service of process was allegedly effected upon the Arizona Corporation Commission and the C. T. Corporation, Dragor's statutory agent in the State of Arizona before its withdrawal from that State.

In the Courts below, service of process was sought to be sustained by the petitioner under an Arizona statute which provided that an action might be commenced against a foreign corporation after it had withdrawn from the State of Arizona in accordance with its laws by the service of process upon the Arizona Corporation

Commission, provided that the cause of action arose in the State of Arizona "from business done or transactions arising" in that State.

Upon motion seasonably made, the Arizona District Court refused, without opinion, to vacate and quash the service of process under said statute. Upon appeal, the Court of Appeals for the Ninth Circuit ruled, in a learned and comprehensive opinion, that the causes of action set forth in the petitioner's complaint "pertain only to the settlement agreement and note executed and delivered in New York" and that the petitioner's suit was "exclusively predicated upon claims arising in New York" (Opinion, p. 23).*

The Court of Appeals thereupon reversed the District Court and vacated the service of process. It declared:

> "The result which we reach here places no hardship upon Union, but protects Dragor from the hardship of being hauled across the country to defend itself in a suit exclusively predicated upon claims arising in New York. Union is a New Jersey corporation and has its principal place of business in Illinois. Nothing in this record suggests how it will be prejudiced by suing Dragor in Delaware, where it was incorporated, or New York, where it has its principal place of business and where this cause of action arose. Arizona has no interest in providing Union with a forum for such an action" (Opinion, p. 23).

Statement of Facts

The argumentative assertions contained in Union's petition are so factually erroneous and misleading that

* The opinion of the Court of Appeals, not as yet reported, is printed as Appendix A to the petition, pp. 15-23. All page references herein to the opinion refer to the pages of the petition, Appendix A.

an accurate statement of the facts is essential to a comprehension of the issues involved herein. Those facts, established under oath by Dragor's President, were submitted to the District Court upon Dragor's special appearance "for the sole and only purpose of contesting the propriety and validity of the purported service of process upon it in this case, and the jurisdiction of this Court over its person * * *" (R., p. 15). Those facts, never controverted, challenged or denied, are as follows:

1. The Execution, Issuance and Delivery of the Settlement Agreement, Promissory Note, Assignment of Claims, Covenant Not To Sue and Other Settlement Documents by and between Union and Dragor in the State of New York on October 3, 1963

Prior to October 3, 1963, Union and Dragor were involved in several extensive suits and cross-suits in the States of Illinois, Arizona and California (R., pp. 21-22). In addition, actions had been instituted by third parties against Union and/or Dragor in various courts, including the State of New York (R., pp. 21-22). Finally, Dragor had asserted certain claims against Union, The Fluor Corporation, Ltd. ("Fluor"), a California Company, and the United States government for contract adjustment arising from and out of a subcontract which had theretofore been executed by and between Union and a joint venture of Dragor and Idaho Maryland Industries, Inc., a California company, covering a portion of the construction of missile launch facilities near Tucson, Arizona (R., p. 22). Such claims would have required hearings before the Board of Contract Appeals in Washington, D. C. and ultimately before the Federal Court of Claims (R., p. 22).

On October 3, 1963, all of these litigations, claims, cross-claims and demands were fully, finally and completely settled and compromised in the State of New York by a settlement agreement between Union and Dragor which was embodied in two documents, one encaptioned "Agreement of Settlement" (R., pp. 5-9), and the second encaptioned "Covenant Not To Sue" (R., pp. 22, 5-9, 26-27). These two documents collectively constituted the settlement agreement between the parties (R., p. 22). Each of these documents was simultaneously executed and delivered in the State of New York. By its terms, the agreement of settlement required Dragor's execution and delivery to Union of a non-negotiable promissory note in the sum of $1,000,000 payable upon certain designated conditions on September 30, 1964 (R., p. 7). Such a note was simultaneously executed and delivered by Dragor to Union in the State of New York (R., pp. 10-11, 22). The agreement of settlement also required the execution of an Assignment to the petitioner's counsel of Dragor's claims against Fluor and the United States government which Union undertook to prosecute promptly and vigorously, crediting Dragor with stipulated percentages of its recovery (R., pp. 7-8, 109). It required, in addition, the execution of stipulations discontinuing with prejudice the pending lawsuits in Arizona and California (R., pp. 8-9). All of these documents were simultaneously executed in the State of New York on October 3, 1963 (R., p. 22).

Upon the issuance, execution and delivery of these settlement documents in the State of New York on October 3, 1963, every right, claim, obligation, demand, liability or cause of action which had previously existed or had previously been asserted by either of the parties against the other, "regardless of the nature or description

thereof and whether or not now known", *were forever released, discharged, extinguished and at an end* (R., pp. 6, 22). From and after October 3, 1963, the *only* duties which Union owed to Dragor and the *only* duties which Dragor owed to Union were those reciprocal duties and obligations which had been carefully formulated by counsel for the parties and explicitly set forth in the Agreement of Settlement, Assignment of Claims, Covenant Not To Sue and Promissory Note, each of which was issued, executed and delivered in the State of New York (R., p. 22). By their terms, these documents created an absolute and immediate obligation on the part of Union to prosecute Dragor's claims against Fluor and the United States, for the benefit of Dragor, and a contingent obligation on the part of Dragor in New York which was not to become due and owing, under any circumstances, until September 30, 1964 (R., pp. 10-11).

2. On September 30, 1964, When the Plaintiff's Cause of Action Allegedly Arose Upon the New York Settlement Agreement and Promissory Note, Dragor Was Neither Engaged in the Transaction of Business Nor Licensed to Do Business in the State of Arizona

It indisputably appears from the record herein that Dragor was not licensed to do business in the State of Arizona on September 30, 1964, and was not in fact transacting any business whatsoever in that State on that day or for many months prior thereto, or at any time thereafter (R., p. 20).

As appears from the formal certificate of the Arizona Corporation Commission (R., p. 25), Dragor had formally withdrawn from the State of Arizona on April 30, 1964, approximately five months before the plaintiff's cause of

action accrued (R., pp. 20, 25). In the language of that certificate, on that day, Dragor *"ceased to exist,* except as to creditors." Simultaneously, the authority of its statutory agent to receive service on its behalf was duly terminated (R., p. 20).

Consequently, it is incontrovertible that Dragor was not engaged in the transaction of any business or qualified to transact any business in the State of Arizona, either on September 30, 1964, when Union's alleged causes of action arose upon instruments executed, delivered and effective in the State of New York, in a transaction consummated in the State of New York, or on December 23, 1964, when service of process was effected upon the Arizona Corporation Commission (R., p. 20).

3. The Petitioner's Complaint

The petitioner's complaint contains two counts (R., pp. 2-11).

In its first count, the petitioner alleges that, on October 3, 1963, Dragor and Union executed an "Agreement of Settlement" (R., pp. 2, 5-9), which provided, in part, that the respondent would pay to the petitioner, "on or before September 30, 1964 the sum of One Million ($1,000,000) Dollars * * * which sum shall be evidenced by a non-negotiable promissory note" of Dragor payable to the order of Union (R., p. 7). It is further alleged that the defendant failed to pay the sum of $1,000,000 "when it became due as provided in said Agreement of Settlement" and that such sum is due and owing from the respondent (R., p. 3).

In its second count, the petitioner alleges that, on October 3, 1963, the respondent "made, executed and delivered a promissory note" payable on September 30, 1964; that

payment of said promissory note is past due and delinquent; and that the petitioner is entitled to the recovery of said amount (R., p. 4).

The petitioner's complaint does *not* allege that the agreement of settlement or promissory note were negotiated, issued, executed, delivered or breached in the State of Arizona (R., p. 20). It does *not* allege that the petitioner's causes of action arose or accrued in the State of Arizona. It does *not* allege that, when the alleged cause of action arose, Dragor was qualified to do business or was, in fact, transacting any business in the State of Arizona (R., p. 20).

The causes of action set forth in the petitioner's complaint are, upon their face, based upon the petitioner's affirmance of the New York settlement agreement of October 3, 1963, the New York promissory note executed and delivered by Dragor thereunder, and the New York general releases executed simultaneously therewith (R., p. 23). By its action, Union was seeking to enforce in the State of Arizona a duty created solely and only by documents executed, delivered and effective in the State of New York and not a duty created by any other transaction or circumstance occurring at any other time or place (R., p. 23).

Similarly, Dragor was affirming the New York settlement agreement, claiming the financial benefits of which it had been deprived by Union's breach of the specific obligations which it had undertaken under the assignment of claims which it had procured as a part of the settlement (R., pp. 23, 98-103). The Court of Appeals noted that both Union and Dragor were seeking to enforce the settlement agreement; neither challenged its validity (Opinion, p. 22).

4. Service of Process

Service of process was purportedly effected by the service of the summons and complaint upon the C. T. Corporation, its former statutory agent, and the Arizona Corporation Commission on the 24th day of December, 1964 (R., pp. 13-14), allegedly under the provisions of §10-481(a)(2) of the Arizona Revised Statutes. That section provides in part that a foreign corporation, before transacting any business in Arizona, shall:

> "Appoint in writing * * * a statutory agent in each county in this state in which the corporation will carry on business, and file with the Corporation Commission, in the form prescribed by the Commission, an irrevocable consent to service of pleadings or process *which shall become effective upon the revocation, annulment or voluntary withdrawal of the license to do business in this state,* and which shall provide that actions arising out of or involving business done or transactions arising in this state may be commenced against the corporation in any court of competent jurisdiction within this state, by the service of pleadings or process upon the Commission." (Italics ours.)

The purpose of such statutes, and the extent of the powers created thereby, have been repeatedly formulated by this Court. In *Morris & Co.* v. *Skandinavia Insurance Co.,* 279 U. S. 405, 49 Sup. Ct. 360, this Court declared at page 361:

> "The purpose of state statutes requiring the appointment by foreign corporations of agents upon whom process may be served is primarily to subject them to the jurisdiction of local courts in controversies *growing out of transactions within*

> *the state* (Citing cases). The language of the appointment and of the statute under which it was made plainly implies that the scope of the agency is intended to be so limited. * * *" (Italics ours.)

Earlier, in *Simon* v. *Southern Ry. Co.*, 236 U. S. 115, 130, 35 Sup. Ct. 255, 260, this Court had stated:

> "But this power to designate by statute the officer upon whom service in suits against foreign corporations may be made *relates to business and transactions within the jurisdiction of the state enacting the law.* Otherwise, claims on contracts, wherever made, and suits for torts, wherever committed, might, by virtue of such compulsory statute, be drawn to the jurisdiction of any state in which the foreign corporation might at any time be carrying on business. The manifest inconvenience and hardship arising from such extra-territorial extension of jurisdiction by virtue of the power to make such compulsory appointments could not defeat the power if in law it could be rightfully exerted. But these possible inconveniences serve to emphasize the importance of the principle laid down in Old Wayne Mut. Life Asso. *v.* McDonough, 204 U. S. 22, 51 L. Ed. 351, 27 Sup. Ct. Rep. 236, that the statutory consent of a foreign corporation to be sued *does not extend to causes of action arising in other states.*" (Italics ours.)

The Grounds Advanced by the Petitioner in its Petition to Justify the Issuance of a Writ of Certiorari by this Court are Erroneous in Fact and Contrary to the Repeated Decisions of this Court

Upon this petition for a writ of certiorari, the petitioner has virtually abandoned every factual and legal argument which it urged in the Courts below to sustain the service of process herein.

In their place, for the very first time, it presents a brand new argument predicated upon a totally erroneous statement of facts. It now contends that the agency of the C. T. Corporation, Dragor's statutory agent in Arizona prior to its formal withdrawal from that state, had never been revoked by Dragor "nor is any revocation asserted by Dragor" (Petition, pp. 10-11). Upon that supposition, it argues that even though Dragor withdrew from the State of Arizona on April 30, 1964, eight months before the purported service of process, its alleged failure to terminate the statutory agency of the C. T. Corporation "constituted an actual consent by that corporation to be found within the state and therefore subject to the jurisdiction of local courts through service of process on the statutory agency" (Petition, p. 9). Such an "actual consent," it is claimed, extended to every cause of action against the foreign corporation, wherever and whenever it arose.

The foregoing arguments are totally unfounded in fact and untenable in law. We turn to an examination of the record and the applicable decisions of this Court, both of which are contravened by the petitioner's newly conceived contentions.

ARGUMENT

POINT I

The Court of Appeals properly ruled that Dragor, a foreign corporation, neither doing business nor qualified to do business in the State of Arizona, could not be subjected to the *in personam* jurisdiction of the Arizona District Court in a suit by the petitioner which was "exclusively predicated upon claims arising in New York" (Opinion, p. 23).

Upon the record herein, the Court of Appeals held that the claims asserted by Union in this action "pertain *only* to the settlement agreement and note executed and delivered in New York"; that "the *only* issues presented related to its breach and not to its validity"; and that Union's suit herein is "predicated *exclusively* upon claims arising in New York * * * where this cause of action arose" (Opinion, pp. 22-23). The factual and legal bases for the determination of the Court of Appeals are incontestable.

Under universally established law, applied by the Court of Appeals to the uncontradicted facts herein, a settlement and compromise constitutes "a new and superior contract superseding and extinguishing the contract or contracts upon which the original action between the parties was based, and the action itself. It relates to matters of differences and controversies other than, as well as, those involved in the original action. It concerns all the claims and grievances of the plaintiff against the defendant and of the defendant against the plaintiff. Each party enters into new agreements and assumes new obligations" (*Moers* v. *Moers,* 229 N. Y. 294 at 300).

A comprehensive description of the legal import of the settlement agreement under the laws of the State of New York—the locus of the instruments—was formulated by the New York Court of Appeals in *Yonkers Fur Dressing Co.* v. *Royal Insurance Co.*, 247 N. Y. 435, in the following language at pages 444, 446:

> "The settlement of the original controversies involved in these actions resulted in a new agreement to the effect 'that the above entitled litigation is settled and terminated, * * * the insurance companies in interest having agreed to pay the sum of $92,500 in full settlement of all claims.' It is the settlement and termination of the litigations, marking a fresh start by the plaintiff from a new coign of vantage. The compromise was wholly foreign and extrinsic to the litigation and to any action by the court. * * * *When the cases were marked 'settled and discontinued' in open court by the parties, it was as if they had never been begun.*
>
> A contract of settlement, if valid in itself, is final and is to be sustained by the court without regard to the validity of the original claim. (Smith *v.* Glens Falls Ins. Co., 62 N. Y. 85; Sears *v.* Grand Lodge A.O.U.W., 163 N. Y. 374.)
>
> * * * The agreement of settlement was, under these circumstances, entered into by defendants, not lightly, inadvertently, inadvisedly or improvidently, but in order to make the best terms possible with the plaintiff. The hope of gaining was balanced against the risk of losing. There was an exchange of equivalents, irrevocable except for fraud, a settlement of a controversy presumably honest. *The old causes of action were terminated. A new liability was substituted therefor. The nature of the new cause of action we need not define. Enough to say that it superseded the old.*" (Italics ours.)

The foregoing rules of law have been universally applied. In *Wilson* v. *Bogert,* 81 Idaho 535, 542, 347 P. (2d) 341, 345, the Supreme Court of Idaho formulated the applicable principles as follows:

> "An agreement of compromise and settlement is a merger and bar of all pre-existing claims which the parties intended to settle thereby. Moran *v.* Copeman, supra; Shriver *v.* Kuchel, 113 Cal. App. 2d 421, 248 P. 2d 35; 15 C.J.S. Compromise and Settlement §24, p. 739. *Such prior claims are thereby superseded and extinguished.* The compromise agreement becomes *the sole source and measure of the rights of the parties* involved in the previously existing controversy. The existence of a valid agreement of compromise and settlement is a complete defense to an action based upon the original claim." (Italics ours.)

The Arizona rule is precisely the same (*Pacheco* v. *Delgardo,* 46 Ariz. 401, 52 P. (2d) 479, 480; *Cano* v. *Arizona Frozen Products Co.,* 38 Ariz. 404, 408, 300 Pac. 953).

If, as the state courts throughout the land, including New York and Arizona, have universally held, an agreement of settlement completely extinguishes an existing claim and disposes of previously instituted actions "as if they had never been begun" (*Yonkers Fur Dressing Co.* v. *Royal Insurance Co., supra,* at p. 444), and if, by virtue of the agreement of compromise and settlement, "a new liability was substituted" for any claims previously existing, the new having "superseded the old", then it is plain that the situs of the actions thereby superseded, extinguished and at an end "as if they *had never been begun*", cannot possibly constitute a constitutional basis for the assumption of jurisdiction over a non-resident foreign corporation upon the superseding obligation by any non-

domiciliary state other than the state where that new obligation was created.

In accordance with these indisputable principles, the Court of Appeals properly ruled that the petitioner's claims in this action "pertain only to the settlement agreement and note executed and delivered in New York"; and that Union's suit herein is "predicated exclusively upon claims arising in New York * * * where this cause of action arose" (Opinion, p. 23).

Directly applicable, therefore, was this Court's decision in *Hanson* v. *Denckla,* 357 U. S. 235, where it vacated a Florida judgment against a Delaware corporate trustee based upon substituted service under a Florida statute: "The cause of action in this case is not one that arises out of an act done or transaction consummated in the forum state. In that respect it differs from *McGee* v. *International Life Insurance Company,* 355 U. S. 220 and the cases there cited" (p. 251).

This Court thereupon concluded in *Hanson,* in language completely dispositive of the issues herein (p. 251):

> "In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of Pennoyer *v.* Neff, 95 U. S. 714, to the flexible standard of International Shoe Co. *v.* Washington, 326 U. S. 310. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. See Vanderbilt *v.* Vanderbilt, 354 U. S. 416, 418. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. *They are a consequence of territorial limitations on the power of the respective States.*" (Italics ours.)

POINT II

The petitioner's newly advanced argument that Dragor's supposed failure to revoke the statutory agency of the C. T. Corporation when it withdrew from the State of Arizona constituted "an actual consent" to its continued presence therein, thereby subjecting it to the jurisdiction of the Arizona courts upon any and every cause of action, wherever and whenever it arose, is erroneous in fact and contrary to the prior decisions of this Court.

A.

THE PETITIONER'S ARGUMENT IS UNFOUNDED IN FACT.

With respect to Dragor's termination of the statutory agency of the C. T. Corporation and Dragor's continuous assertion thereof in the Courts below, the record conclusively establishes:

1. Upon the respondent's motion before the District Court to quash, vacate and annul the service of process and dismiss the summons and complaint, the respondent's president swore—and his testimony was never contradicted or challenged (R., p. 20):

> "As appears from the formal certificate of the Arizona Corporation Commission, a copy of which is hereunto annexed as Exhibit '1', Ward formally withdrew from the State of Arizona on April 30, 1964. *Simultaneously, the authority of its statutory agent to accept service on its behalf was duly terminated.*"

2. In its opening brief to the Court of Appeals (pp. 2-3), the respondent stated in its "Statement of the Case" that

> "the appellant Dragor had formally withdrawn from the State of Arizona and *terminated the authority of its statutory agent to accept service on its behalf on April 30, 1964.*"

3. In its statement of facts, it recited the following (Opening Brief, p. 9):

> "Dragor had formally withdrawn from the State of Arizona on *April 30, 1964* approximately five months before the plaintiff's cause of action accrued (Record, pp. 20, 25). *Simultaneously the authority of this statutory agent to accept service on its behalf was duly terminated* (Record, p. 20)."

4. In its summary of the facts which it deemed incontrovertibly established by the Record, the respondent stated (Opening Brief, p. 10):

> "On April 30, 1964, Dragor formally withdrew from the State of Arizona and *terminated the authority of its statutory agent in Arizona to accept service on its behalf.*"

5. In its Specification of Errors, at page 13 of its opening brief, the respondent urged that

> "the District Court erred in holding that on April 30, 1964, when the appellant formally withdrew from the State of Arizona and *terminated the authority of its statutory agent in that state,* the appellee was an Arizona creditor of the appellant upon an obligation created in Arizona."

6. In its Argument, the respondent urged in Point I(B) (p. 19) that

> "having formally withdrawn from the State of Arizona on April 30, 1964, *and terminated the authority of its Arizona agent on that day,* Dragor could not, eight months thereafter, be subject to the jurisdiction of the Arizona District Court upon a cause of action arising in the State of New York under settlement documents executed and delivered in that state."

It is plain, therefore, that the petitioner's present claim that the agency of the C. T. Corporation was never "revoked" by Dragor nor was "any revocation asserted by Dragor" in the Courts below (Petition, pp. 10-11) is simply untrue.

B.

THE PETITIONER'S ARGUMENT IS UNTENABLE IN LAW.

The petitioner's legal argument, predicated upon its erroneous factual hypothesis, is equally specious. Assuming, *arguendo,* and solely for the purpose of this discussion, that the statutory agency of the C. T. Corporation was not specifically revoked upon the respondent's withdrawal from the State of Arizona, the revocation of the statutory agency would nevertheless have become immediately effective.

Under the Arizona Revised Statutes, §10-481(a)(2), upon "the revocation, annulment or voluntary withdrawal of the license of the corporation to do business in this state", the irrevocable consent to the service of pleadings or process previously executed by the respondent became automatically operative. By its terms, that irrevocable consent provided that "actions arising out of or involving business done or transactions arising in this state may be

commenced against the corporation in any court of competent jurisdiction within this state, by the service of pleadings or process upon the commission." Consequently, any statutory agent appointed prior to the withdrawal would automatically be supplanted upon its withdrawal by the Arizona Corporation Commission upon whom service of pleadings or process could be effected, expressly limited, however, to causes of action arising in the State of Arizona (Opinion, p. 23).

Neither the failure to revoke the statutory agency nor the substitution therefor by a state agency under a state statute would warrant any jurisdiction *in personam* over the withdrawn foreign corporation by the courts of that state upon causes of action arising outside the state. The foregoing proposition of law has been settled by this Court for decades.

The precise issue presented by the petitioner herein to support its request that this Court grant certiorari was considered and rejected by this Court more than 40 years ago in *Chipman Ltd.* v. *Thomas B. Jeffrey Co.*, 251 U. S. 373, 40 Sup. Ct. 172. In that case, the plaintiff commenced an action in the Supreme Court of the State of New York which was removed to the United States District Court for the Southern District of New York. In the latter Court, the defendant moved to vacate the service of process and dismiss the complaint for lack of jurisdiction over the person of the defendant. The plaintiff was a New York corporation. The defendant was a Wisconsin corporation. The plaintiff's action was based upon the defendant's alleged breach of a contract made in Wisconsin.

Prior to the commencement of the action, the defendant had been duly qualified to do business in the State of New York and had designated as its statutory agent upon whom process may be served one, Philip B. Adams, of 21 Park Row, New York, New York. Thereafter, the

defendant removed from the State of New York under its laws. It failed, however, to revoke the designation of Adams as its statutory agent for the service of process. The summons was served upon Adams subsequent to the withdrawal.

It was argued in that case, precisely as in this, that the unrevoked designation of Adams as an agent of the defendant continued the defendant's presence in the State of New York and vested the District Court with jurisdiction *in personam*. In affirming the decision of the Courts below, setting aside the service of the summons and dismissing the complaint for lack of jurisdiction over the person; this Court formulated the plaintiff's arguments in that case in language almost identical with the plaintiff's arguments in this case, at page 378:

> "whether * * * the unrevoked designation of Adams as an agent of defendant gave the latter constructive presence in the state, * * *"

In holding that the District Court did not acquire jurisdiction over the person of the corporate defendant, this Court ruled that the unrevoked designation of a statutory agent after the defendant had withdrawn from the State of New York did not subject the foreign corporation to the *in personam* jurisdiction of the forum state upon a cause of action arising in Wisconsin.

The rationale of the foregoing decision was reaffirmed in *Robert Mitchell Furniture Co.* v. *Selden Breck Construction Co.*, 257 U. S. 213, 42 Sup. Ct. 84. In that case, the plaintiff, an Ohio corporation, brought an action in the Federal Courts of Ohio against the defendant, a Missouri corporation, upon an Illinois contract to be performed in Michigan. The defendant had designated one, Simeon Nash, as an agent for the service of process in

Ohio. Thereafter, it withdrew from that state and performed no business therein. Service of process was effected upon Nash. In holding that "the service upon Nash was bad", this Court ruled that, having withdrawn from the State of Ohio, "the agency of Nash did not extend to receiving service in a suit upon a contract made and to be performed as this was (*Chipman Ltd.* v. *Thomas B. Jeffrey Co.*, 251 U. S. 373, 40 Sup. Ct. 172)."

In *Morris & Co.* v. *Skandinavia Insurance Co.*, 279 U. S. 405, 49 Sup. Ct. 360, an action brought in a State Court of Mississippi was removed to the United States District Court. The plaintiff was a Louisiana corporation and the defendant a Danish corporation engaged in the insurance business. The action was brought against the defendant upon a policy of insurance issued by the defendant in Argentina. Prior thereto, the defendant had appointed both a resident agent and the Mississippi Insurance Commissioner as its agent upon whom process could be served. In dismissing the summons upon the ground that the District Court acquired no jurisdiction *in personam* over the defendant, notwithstanding the service upon the state Insurance Commissioner under the defendant's unrevoked designation, upon causes of action not arising in Mississippi, this Court reaffirmed its prior decisions and emphasized the fact that:

> "The policy sued on was issued and the loss occurred in South America. The importation of such controversies would not serve any interest of Mississippi."

A recent decision by the Court of Appeals for the Seventh Circuit, *Munch* v. *United Air Lines, Inc.*, 184 Fed. (2d) 630 (1950), is precisely in point. In that case, an action was brought in the District Court of Illinois

against the Douglas Aircraft Company upon a cause of action based upon the crash of a plane in Utah. Douglas had originally been authorized to do business in the State of Illinois. At that time, it designated the C. T. Corporation System as its registered agent for the service of process. Although Douglas never withdrew in the manner prescribed by Illinois statutes, its certificate had been revoked by the Illinois Secretary of State several months prior to the service of the summons because of Douglas' failure to pay franchise taxes. However, notwithstanding that revocation, Douglas never terminated the authority of the C. T. Corporation as its registered agent in Illinois for the service of process. The Court of Appeals for the Seventh Circuit phrased the issue before it as follows (p. 632):

> "With respect to the order quashing the service of summons on Douglas Aircraft, plaintiffs contend that, since Douglas had not withdrawn from Illinois in the manner prescribed by Section 120 of the Business Corporation Act *and had never revoked the authority of its registered agent* in accordance with the provisions of that section, *Douglas was subject to process by service on its registered agent* and that the lower court erred in deciding otherwise. Douglas, on the other hand, maintains that, though it had not complied with the Illinois statute, it had, in fact, withdrawn from Illinois and consequently, could not be served there." (Italics ours.)

In sustaining the decision of the District Court which quashed the service of process and dismissed the complaint under an Illinois statute virtually identical with the Arizona statute involved herein, the Court of Appeals squarely ruled that the failure of Douglas to revoke the statutory agency of the C. T. Corporation System could

not vest the Illinois District Court with jurisdiction *in personam* over Douglas upon an action arising in Utah. The Court declared:

> "It seems clear then, that in the case of any foreign corporation whose authority to transact business in Illinois has been terminated, irrespective of whether the termination was effected by issuance of a certificate of withdrawal or by revocation of its certificate of authority, the corporation remains, under the Act, subject to service of process in Illinois in only such cases as had their origin in Illinois during the period in which the corporation was licensed to do business there. This case obviously does not fall within that category. * * *"

In view of the decisions cited and quoted above, it is clear, beyond the possibility of rational dispute, that the decision of the Court of Appeals herein, far from being "in conflict with decisions of this Court" (Petition, p. 9), is in precise and exact accord with the principles set forth in *Simon* v. *Southern Ry. Co.*, 236 U. S. 115, 35 Sup. Ct. 255; *Chipman Ltd.* v. *Thomas B. Jeffrey Co.*, 251 U. S. 373, 40 Sup. Ct. 172; *Robert Mitchell Furniture Co.* v. *Selden Breck Construction Co.*, 257 U. S. 213, 42 Sup. Ct. 84; *Morris & Co.* v. *Skandinavia Insurance Co.*, 279 U. S. 405, 49 Sup. Ct. 360; *Hanson* v. *Denckla*, 357 U. S. 235, and a host of other decisions, both state and federal, far too numerous for extended comment.*

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* Some of the innumerable state and federal cases applying the rules of law set forth in the text, under statutes virtually identical with the Arizona Statute, are: *Hunter* v. *Mutual Reserve Life Insurance Co.*, 184 N. Y. 136, affirmed in 218 U. S. 573, 31 Sup. Ct. 127; *Hexter* v. *Day-Elder Motors Corp.*, 192 A.D. 394 [N. Y.]; *Livingston* v. *Southern Surety Co.*, 262 Mich. 438, 247 N. W. 712; *Haynes* v. *United Ins. Co.*, 48 Ohio App. 475, 194 N. E. 381; *Kelly* v. *Johnson Nut Co.*, 38 Fed. (2d) 177; *Reliance Motor Co.*

POINT III

The petitioner's argument that "the refusal to permit service of process pursuant to the Arizona statute in effect holds such statute unconstitutional" (Petition, p. 11) is unfounded.

By the express provisions of Ariz. Rev. Stat. §10-481(A)(2), the State of Arizona has limited the *in personam* jurisdiction of its courts over a foreign corporation which had withdrawn from its borders to causes of action which arose within the state. In this case, as well as in its earlier decision in *Arizona Barite Co.* v. *Western-Knapp Engineering Co.*, 170 Fed. (2d) 684, the Court of Appeals simply applied and enforced the statutory mandate.

In *Arizona Barite Co., supra,* it emphasized the fact that, "according to the complaint, the claim or cause of action sued on arose in Maricopa County (Arizona) out of business transacted by appellee in Maricopa County * * *" (p. 685). In *L. D. Reeder Contractors of Arizona* v. *Higgins Industries,* 265 Fed. (2d) 768 (9th Circ.), after a penetrating review of this Court's decisions in *McGee* v. *International Life Insurance Co.*, 335 U. S. 220 and *Hanson* v. *Denckla,* 357 U. S. 235, the Court of Appeals quashed the service of process and dismissed the complaint because (pp. 775 *et seq.*):

> "It is difficult to see how any facts showing defendant's activities within the forum state of

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v. *Craig,* 206 Iowa 804, 221 N. W. 499; *Confidential, Inc.* v. *Superior Court for Los Angeles,* 157 Cal. App. [2d] 75, 320 Pac. 2d 546; *Gerrick & Gerrick Co.* v. *Llewellyn Iron Works,* 105 Wash. 98, 177 Pac. 692; *Kirker-Bender Fire Escape Co.* v. *Chicago Beach Hotel,* 116 Fed. 359; *Mutual Reserve Fund Life Assoc.* v. *Boyer,* 62 Kan. 31, 61 Pac. 387.

California gave rise to any of the causes of action contained in the complaint."

In view of the foregoing decisions, and the authorities heretofore cited, the petitioner's contention that "the refusal to permit service of process pursuant to the Arizona statute in effect holds such statute unconstitutional" (Petition, p. 11) requires no further comment.

Conclusion

The vice of the petitioner's persistent attempts to drag the respondent across the country before the Arizona District Court, characterized by this Court in *Gulf Oil Corp.* v. *Gilbert,* 330 U. S. 501, 507, 67 Sup. Ct. 839, 842 (1947), as "a strategy of forcing the trial at a most inconvenient place for an adversary", is dramatically illustrated by what has occurred in the within case.

The only consideration which induced this respondent to settle and compromise the various suits and claims in which it was involved prior to October 3, 1963 was the enormous and imminently ruinous cost of being compelled to engage in extensive litigations in California, Arizona and other states many thousands of miles from its principal office (R., pp. 82-83). It sought to purchase its peace, permanently, and remove itself from the various forums in which it was incurring an economic burden which it could no longer bear by executing, in the State of New York, an agreement of settlement and compromise which terminated, for all time, any contact whatsoever with the State of Arizona. It sought, by these means, and by the contemplated expenditure of an enormous sum of

money, to dispose forever of matters for which it had denied any liability whatsoever, by defining and limiting its obligation, as well as the obligations of the other party to the controversies between them, to the duties and responsibilities created by the settlement agreement executed and delivered in New York. The alleged breach of that agreement by either Union or Dragor created litigable issues which possess no constitutional nexus whatsoever with any other jurisdiction but the State of New York.

The settlement which both parties are seeking to affirm, each charging the other with its breach, disposed forever of any possible contact with the State of Arizona which may have existed prior to the execution thereof. The petitioner is nevertheless endeavoring, as a litigating tactic, to subject Dragor to the intolerable pressures of a litigation in Arizona upon the very contract by which, for an inordinate price, it had sought to disassociate itself permanently from a state where continued litigation threatened it with financial ruin (R., p. 83).

The decision of the Court of Appeals neither abridges the substantive rights of the parties herein nor affects them adversely. The petitioner is free to procure an adjudication upon the merits of its claims, as suggested by the Court of Appeals, "by suing Dragor in Delaware, where it was incorporated, or in New York, where it has its principal place of business, and where this cause of action arose. Arizona has no interest in providing Union with a forum for such an action" (Opinion, p. 23).

It is respectfully submitted that the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 283

UNION TANK CAR COMPANY, a New Jersey corporation,

Petitioner,

vs.

DRAGOR SHIPPING CORPORATION, a Delaware corporation, formerly WARD INDUSTRIES CORPORATION,

Respondent.

REPLY TO BRIEF OF RESPONDENT

It is conceded that Respondent, Dragor Shipping Corporation, was doing business in Arizona and was licensed to do business there for 17 years, including the date on which it incurred the debt sued upon in this action.

It is further conceded that service of process was made, both upon Dragor's duly appointed agent and upon the Arizona Corporation Commission pursuant

to Section 10-481 Arizona Revised Statutes. Respondent claims, contrary to record evidence, the authority of its appointed agent had been revoked before this suit was filed, but does not dispute that on such revocation the Arizona law (§ 10-481, A.R.S.) designates the Arizona Corporation Commission, irrevocably, as agent for the service of process upon it.

The legal question which calls for certiorari is created by the decision of the Court of Appeals which held that a settlement agreement executed between Petitioner and Respondent before it attempted to withdraw from Arizona obviated the effect of Rule 4(d)(3) of the Federal Rules of Civil Procedure and insulated Respondent from being sued in Arizona on an obligation incurred while it was licensed in that state.

REPLY TO RESPONDENT'S STATEMENT OF FACTS

Respondent seeks to create a false impression that a fact dispute exists with respect to the questions presented by Union's petition. Dragor characterizes Petitioner's statement of facts as "erroneous and misleading" (R. 3), but fails to point to a single factual inaccuracy therein, or to note that Petitioner's statement is substantially identical with that contained in the opinion of the Court of Appeals. Respondent's re-statement of facts in its brief introduces no new or different fact consideration, but is included only as an excuse for further emphasizing a fact which Respondent believes of controlling significance and which is not disputed — that the agreement settling the Arizona

claims and causes of action was executed by Dragor in New York rather than in Arizona.[1]

Respondent's assertion that Arizona's issuance of a certificate of withdrawal simultaneously terminated the authority of its statutory agent to accept service constitutes a partisan legal conclusion advanced in the affidavit of Dragor's lawyer and president, rather than a fact (R.20). This assertion was expressly contradicted on the record in petitioner's counter-affidavit and no evidence, documentary or otherwise, was ever offered to establish the revocation of the agency of C. T. Corporation or that C. T. Corporation had acted without authority in accepting service of process (R.63). The burden of proof was on Respondent. *Robinson Brick & Tile Co.* v. *Copperstate Supply Co.*, (Ariz. 1966), 410 P. 2d 96.

The legal conclusion of Dragor's president was erroneous because the formal certificate issued by the Arizona Corporation Commission contained on its face an exception which stated "and thereupon such corporation ceased to exist, except as to creditors." (R.25) At the time of the attempted withdrawal by Dragor, Petitioner was a creditor of Dragor on an obligation arising out of acts performed in Arizona while Dragor had been qualified to do business in that state. By the very terms of the certificate, Dragor's authority to transact business in Arizona, therefore, was *not* terminated as against Petitioner. This conclusion is further supported by the Arizona statutes which provide the manner in

(1) In its opinion the court below erroneously stated that the stipulations dismissing the Arizona suits were also executed in Arizona (App. A pp. 20, 22). On petition for rehearing, Union directed the attention of the court below to the fact that the stipulations were prepared in Arizona by Arizona counsel that and the cases were dismissed by order signed October 3, 1963, the same day the agreement of settlement was signed in New York. (Petition for Rehearing, p. 2)

which revocation may be made and which contain no provision for revocation of the statutory agent by the issuance of a certificate of withdrawal. (See Appendix C, pp. 26-27).

Because judgment was granted on the pleadings, Rule 52 F.R.C.P. did not apply and no special findings of fact or conclusions of law were necessary to support the trial court's judgment. Nevertheless, the judgment (R. 151) necessarily was based on finding of the facts necessary to support the jurisdiction of the court.

Jurisdiction is a question of fact, or a mixed question of fact and law, and the Court of Appeals was therefore bound by the trial court findings, but erroneously disregarded them. *Jennings* v. *McCall Corp.*, (C.A. 8, 1963) 320 F.2d 64, 67.

Reply to Respondent's Point I

In support of the opinion below, respondent cites authorities for the proposition that a compromise and settlement supersedes any pre-existing claims which the parties thereby intend to resolve (Respondent's Brief pp. 13-14). These cases correctly state the general common law principle, but none of them to the slightest degree holds that a compromise and settlement insulates a foreign corporation from its previous contacts with the state so as to prohibit the courts of that state from constitutionally exercising jurisdiction over its person. Respondent makes no effort to bridge this gap or to show what policy or jurisdiction exists for concluding that a compromise and settlement agreement should have this effect on jurisdictional due process, and thus nullify Rule 4(d)(3).

The only case Respondent cites on due process is *Hanson* v. *Denckla,* 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.

1283. There is not the slightest resemblance between the cases. *Hanson* v. *Denckla* did not involve compromise and settlement, but a situation in which a Florida probate court had attempted to exercise personal jurisdiction over a Delaware trustee by means of service of publication.

In the instant case, the defendant had done business in Arizona, had been licensed there 17 years, had, while so licensed, defaulted in a large construction contract in Arizona, and had been sued for such breach, had given its promissory note in settlement of the claim for damages, and had been personally served on an action brought in Arizona for payment of the note.

In *Hanson* v. *Denckla,* jurisdiction was denied because there was no "act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state."

Dragor can make no claim of lack of purposeful contacts, nor any claim that suit in Arizona offends "traditional notions of fair play and substantial justice."

Since *Harris* v. *Balk* (1905) 198 U.S. 215, 25 S.Ct. 625, 49 L.Ed. 1023, it has been the law that the question of jurisdiction does not depend upon the "so-called [redacted] of the debt." The court said:

> "By situs is meant the place of the creation of the debt, that fact is immaterial. If it be meant that the obligation to pay the debt can only be enforced at the situs thus fixed, we think it plainly untrue. The obligation of the debtor to pay his debt clings to and accompanies him wherever he goes."

Nothing in the documents states or infers that they would create a New York contract. To the contrary,

as Respondent admits, Union dictated the settlement, and as pointed out in the petition, execution of the contract in New York was merely fortuitous because that is where Isbrandtsen, the guarantor (R.8), happened to be at the moment.

Respondent, however, did succeed in inducing the court below to accept and adopt the legal fiction that all such contacts lost their jurisdictional significance because of a compromise and settlement agreement executed in another state. Yet the court below attributes greater jurisdictional significance to the mere place of execution than it was prepared to attribute to the activities which prompted the agreement.

Reply to Respondent's Point II

As a mere legal conclusion, the uncorroborated statement by Respondents that Dragor had "duly terminated" the authority of its statutory agent did not require contradiction, but it is, in fact contradicted by the record, by the terms of the certificate of withdrawal, and by the affidavit of Mr. Thomas C. McConnell, in relevant part as follows (R.63):

> ". . . that this affiant denies the statement made in the Weiser affidavit that 'as appears from the formal certificate of the Arizona Corporation Commission, a copy of which is hereto annexed as Exhibit 1, Ward formally withdrew from the State of Arizona on April 30, 1964. Simultaneously, the authority of its statutory agent to accept service on its behalf was duly terminated'; and affiant says that actually said formal certificate shows that there was an exception therein contained which stated 'and thereupon said corporation ceased to exist, except as to creditors'; that at the time of said attempted withdrawal by Ward the

> plaintiff Union was a creditor of Ward on an obligation created by acts performed in Arizona at a time when Ward was qualified to do business in Arizona and therefore by the very terms of the affidavit Ward did not terminate its authority to do business in Arizona as against this plaintiff."

As pointed out, *supra,* the burden of proof was on Respondent, and the trial court resolved this fact controversy in favor of Petitioner.

Respondent's argument is summarized as follows:

> "Neither the failure to revoke the statutory agency nor the substitution therefor by a state agency under a state statute would warrant any jurisdiction *in personam* over the withdrawn foreign corporation by the courts of that state upon causes of action arising outside the state. The foregoing proposition of law has been settled by this Court for decades."

In support of this statement, Respondent does not cite any recent pronouncement of this Court. *International Shoe* v. *Washington* and *McGee* v. *International Life Ins. Co.* are not mentioned.[2]

Instead, Respondent cites to this Court a series of cases, all decided before 1929, construing widely different statutes and widely different fact situations, the most recent of which is *Morris & Co. v. Skandinavia Insurance Co.* (1929), 279 U.S. 405, 49 S.Ct. 360, 73 L.Ed. 762, which involved an action in Mississipi by a Louisiana corporation against a Danish corporation on an insurance policy issued in Argentina.

Chipman, Ltd. v. Jeffrey, 251 U.S. 373, 40 S.Ct. 172, 64 L.Ed. 314, a 1920 case, is said by Respondent

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(2) *International Shoe Co.* v. *Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95. *McGee* v. *International Life Ins. Co.,* 355 U.S. 220, 78 S.Ct. 199, L.Ed. 2d 223.

to present "the precise issue." Even before *International Shoe* and *McGee*, that case would not have been in point because it was based on the New York statute containing this extremely limited provision:[3]

> "The filing of such certificate shall not, however, *affect any action pending* at the time of such surrender, *or affect any action in the state upon any contract made by the corporation in this state* before the filing of the certificate of surrender of authority." (Emphasis supplied)[4]

This obviously cannot be compared with Section 10-481, A.R.S. which provides in pertinent part:

> "Actions arising out of or involving business done or transactions arising in this state may be commenced against the corporation in any court of competent jurisdiction within this state. . ."

These ancient cases were not cited to the Court of Appeals, but are apparently cited now in an effort to bolster the comment in the opinion below (R. 23): "Arizona has no interest in providing Union with a forum . . ." for this action.

The effect of this holding is to declare that the Due Process Clause *actually prohibits* Arizona from granting relief against a foreign corporation on a cause of action alleged to arise outside the state and not related to the activities of the corporation within the state.

This is error. This court held in *Perkins v. Benguet Consol. Min. Co.*, (1952) 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485, that, contrary to the older decisions holding that the Due Process Clause *precluded* a state from authorizing its officials to accept service on a corporation

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(3) As quoted in *Hexter* v. *Day-Elder Motors Corp.*, 182 N.Y.S. 717, 718.

in proceedings to enforce an obligation arising outside the forum,[4]

> "that conception now has been modified by the rationale adopted in later decisions and particularly in *International Shoe Co. v. Washington,* 326 U.S. 310, 90 L.Ed 95, 66 S.Ct. 154, 161 A.L.R. 1057."

The court held that so long as "traditional notions of fair play and substantial justice" are not offended, it does not violate federal due process for a state to take or decline jurisdiction of a corporation. *Old Wayne Life Asso.* v. *McDonough,* 204 U.S. 8, 27 S.Ct. 236, 51 L.Ed 351, and *Simon* v. *Southern Ry. Co.,* 236 U.S. 115, 35 S.Ct. 255, 59 L.Ed 492, on which the Ohio court had relied (and on which Respondent relies) were declared no longer to be the law.

On remand to the Supreme Court of Ohio, that Court, remarking that the Supreme Court had held that "due process neither prohibits or compels the taking of jurisdiction" directed the trial court to take jurisdiction. *Perkins* v. *Benguet Consol. Min. Co.,* 107 N.E.2d 203.

In the instant case the trial judge held that either under the Arizona statute or the Federal Rules of Civil Procedure jurisdiction had been obtained and that sufficient contacts existed, and held Dragor to answer. This was correct under *Benguet, supra,* for ". . . consideration of the circumstances which . . . ultimately will determine whether the courts of that state will choose to take jurisdiction is reserved for the courts of that state."

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(4) cf. Section 10-481, Arizona Revised Statutes, requiring an *irrevocable consent to service of pleadings or process,* effective on withdrawal from the state.

Contrary to the trend "toward expanding the permissible scope of state jurisdiction over foreign corporations,"(5) the decision of the Court of Appeals regresses to the reasoning of *Simon* v. *Southern Ry. Co.*, and similar cases.

Answer to Respondent's Point III

The Court of Appeals obviously came to an erroneous conclusion when it held that Union's claim under its promissory note, which arose out of Arizona litigation, which in turn arose out of Dragor's breach of a multi-million dollar contract to be performed in Arizona, was not an action "arising out of or involving business done or transactions arising" in Arizona.

The Arizona Legislature, in providing disjunctively in A.R.S. 10-481, that actions might be commenced, *whether* arising out of *or* involving business done *or* transactions arising in the state, was attempting to give the broadest and most liberal construction to the statute. The Legislature was putting no limitations on its officials such as were present in the ancient cases cited by Respondent, such as *Simon* v. *Southern Ry. supra,*

The Arizona Supreme Court also places the broadest and most liberal construction upon the amenability of non-resident defendants to the jurisdiction of the Arizona courts, so long as the traditional notions of fair play and substantial justice are satisfied. *Phillips* v. *Anchor Hocking Glass Corp.*, (1966), 413 P.2d 732.

If, as the trial court found, the settlement agreement and note were transactions arising in Arizona, and if, as the Court of Appeals held, the Due Process Clause

(5) McGee v. International Life Insurance Co., 355 U.S. at page 222, 78 S.Ct. at page 201.

precludes the enforcement of Section 10-481, Arizona Revised Statutes, solely because the parties had executed a compromise and settlement agreement in New York, then the Court of Appeals decision has, for all practical purposes, and effectively, declared Section 10-481 as well as Rule 4(d)(3) of the Federal Rules of Civil Procedure unconstitutional.

There is no doubt that Dragor attempted to withdraw from Arizona in order to delay and impede Union in the collection of its debt.

In *Anchor-Hocking,* the Arizona Supreme Court held that it is unnecessary for a defendant to "purposefully" act within the forum state. It said:

> "To do so, is to revitalize the 'implied consent' theory emasculated by the International Shoe case and to reverse the trend expanding state jurisdiction over nonresidents which trend was recognized in the Hanson decision. To make the requirement of purposeful activity within the state a necessary prerequisite to personal jurisdiction in all cases undermines the notion that the facts of each case must be examined to decide whether it is fair to exercise jurisdiction of the defendant."

Certiorari should be granted because the decision of the Court of Appeals has decided an important state question in a way in conflict with applicable state law, and has decided a federal question in a way in conflict with applicable decisions of this court and the Federal Rules of Civil Procedure promulgated by this court.

CONCLUSION

The "estimate of the inconveniences" mentioned in *International Shoe* is also relevant here.

In May, 1962, Union filed a diversity action in the federal court in Illinois against Dragor to recover the losses it had sustained by reason of the default of the Joint Venture. Dragor moved to transfer the case to the federal court in Arizona pursuant to 28 U.S.C. 1404(a),(R.43) and submitted the affidavit of its then president, in part as follows (R.43):

> "... the project, the witnesses and the documents are in Arizona ... in this connection all three parties are subject to the jurisdiction of the Arizona district court in Tucson, Arizona."

On the strength of this affidavit, the case was removed to Arizona (Union Tank Car Company v. Ward Industries Corporation, Civil 1482-Tuc.) (R.43). While the file in Civil 1482 was en route to Arizona, Dragor brought an action in Arizona against Union seeking $3,450,000 damages on the spurious ground that Union had lured Ward into becoming a joint adventurer with IMI. Respondent never sought to bring this action to trial.

At the time that Dragor purportedly withdrew from Arizona, it was also engaged in litigation in the same court in an action brought against it as the surviving member of the Joint Venture, by Mosher Steel Company, a materialman to the Joint Venture. On May 24, 1966 the district court rendered judgment against Dragor for said materials in the sum of $268,882.72.[6]

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[6] The court also entered judgment against Union for the same amount on the ground that it had promised plaintiff to pay the Joint Venture's obligation.

In each case the litigation in Arizona was carried on there because of Dragor's affirmative action or default.

Moreover, Dragor has pending a counterclaim against Union for "in excess of $1,000,000" (R.98) alleging: (a) that Union had mishandled the claims assigned by Dragor under the Agreement of Settlement (R.101), and (b) that Union had violated its covenant not to sue by asserting in the course of the trial of the Mosher Steel case in the district court in Arizona that Union, if liable at all, was liable to Mosher only as a surety for Dragor.[7]

Judgment was rendered against Dragor under Rule 54, so the counterclaim, although set forth in the record, was not before the Court of Appeals at the time of the decision below. This accounts for the erroneous statement (Petition, P.21) in the opinion:

> "no contention raised in Union's complaint or Dragor's answer brings into question any issue of fact or law pertaining to the former dealings between these parties in Arizona."

Obviously, the counterclaim pertains solely and exclusively to the "former dealings between these parties in Arizona." The claim that Union mishandled claims arising out of the missile base contract involves the plans, specifications and change orders of the contract; the time and manner of presentation of the claims to the U.S. Engineers in Arizona; and the validity of the claims depends upon the manner and efficiency of the performance in the work in Arizona. The remaining portion of the counterclaim involves the evidence and

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(7) The counterclaim, on Union's motion, was set for trial on December 7, 1965. Dragor declined to appear or present evidence and the court dismissed the action for want of prosecution. That dismissal is now on appeal by Dragor to the Ninth Circuit as Docket No. 20904.

pleadings in the Mosher Steel case, all of which repose with the court in Arizona.

In *Phillips* v. *Anchor-Hocking Glass Co., supra,* Arizona Supreme Court said:

> "... fair play includes a consideration of the quality, nature and extent of defendant's activity in the forum state, relative convenience of the parties in relation to the place of trial, the benefits and protections of the laws of the forum state afforded the parties, and the basic equities existing between the parties."

We respectfully submit that the Respondent's contention that it is insulated from the jurisdiction of the Arizona court by the agreement of settlement is without support, either in fact or in law. Dragor is no stranger to Arizona, but manifest injustice would result if Petitioner were required to sue Dragor, in New York or Delaware, as directed by the court below, because Respondent's counterclaim, which it asserts to be compulsory in nature, should, for the convenience of the court and parties, be tried in Arizona, if it is to be tried at all, because that is where the alleged acts giving rise to the counterclaim took place.

For all these reasons, we urge that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review its judgment herein.

Respectfully submitted,

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